No. 2

In the Supreme Court of the United States

OCTOBER TERM, 1959

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK" AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R. GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
JOHN F. DAVIS,
Assistant to the Solicitor General,
WILLIAM F. TOMPKINS,
Special Assistant to the Attorney General,
KEVIN T. MARONEY,
BRUCE J. TERRIS,
ANTHONY A. AMBROSIO,
ELIZABETH F. DEFEIS,
Attorneys,
Department of Justice, Washington 25, D.C.

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This supplemental brief for the United States is filed pursuant to the order of this Court dated March 23, 1959 (359 U.S. 940; R. 867), setting the case down for reargument and directing that counsel discuss the following questions in their further briefs and oral arguments:

> 1. Whether under the laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody,

and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.

3. Whether on the record before us the issues involved in Questions "1(a)," "1(b)," and "2" are properly before the Court.

In our prior brief (1958 Brief, p. 2) and argument we were limited by the Court's order granting certiorari (358 U.S. 813; R. 866; *infra*, p. 4) to consideration of the validity of the search and seizure which produced certain evidence used at the trial. Since no issue had ever been raised concerning the validity of the petitioner's arrest as such, we assumed that the arrest was (as it was conceded to be), valid, and confined our argument to the legality of a search incident to an Immigration Service arrest. Now the questions posed by the Court's reargument order raise specifically the issue of the validity of the arrest. In this brief we shall discuss that issue, but will not repeat our argument with respect to the propriety of a search incident to an immigration arrest, as to which we rely on our 1958 Brief.

STATEMENT

The petitioner was charged (R. 7–19) in an indictment returned on August 7, 1957, in the United States District Court for the Eastern District of New York with having conspired with others, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States in violation of 18 U.S.C. 794(a), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U.S.S.R. in violation of 18 U.S.C. 793, and (3) to act in the United States as an agent of the U.S.S.R. without prior notification to the Secretary of State in violation of 18 U.S.C. 371 and 18 U.S.C. 951. Prior to trial, the petitioner moved to suppress as evidence certain items which he alleged were illegally seized at the time and place of his arrest (R. 239). Affidavits were filed in support and in opposition to the motion (R. 22–78), and a hearing was held (R. 4, 79–238). The motion was denied (155 F. Supp 8; R 239–246).

At the trial, the government offered in evidence seven of the items seized in the petitioner's hotel room

[1] This Statement describes the evidence relating to the validity of the petitioner's arrest. A more complete Statement detailing the circumstances surrounding the search was included in the government's 1958 Brief, pp. 3–23.

at the time of his arrest or shortly thereafter (Exs. 77–81, 87, 88; R. 661–671, 693–695, 724, 726). Subsequently, the petitioner was convicted by a jury on all three counts of the indictment and was sentenced on November 15, 1957, to serve a total of thirty years' imprisonment and to pay a $3,000 fine (R. 5–6). On appeal to the Court of Appeals for the Second Circuit, the petitioner's conviction was affirmed (258 F. 2d 485; R. 837–865).

The petitioner filed a petition for certiorari on August 8, 1958. On October 13, 1958, this Court granted certiorari (358 U.S. 813; R. 866) "limited to questions 1 and 2 presented by the petition for the writ which read as follows:

> "1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?
>
> "2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

After argument, the Court, on March 23, 1959, ordered reargument and requested counsel to discuss certain

questions concerning the validity of the petitioner's arrest, 359 U.S. 940, see *supra*, pp. 1–2.

The pertinent facts are as follows:

A. BACKGROUND OF THE PETITIONER'S ARREST

Information concerning the petitioner's espionage activities in the United States was given the F.B.I. in May, 1957, by one Reino Hayhanen, a defected Soviet agent (R. 437–444). Investigation by the government corroborated many details of Hayhanen's statements (R. 513–537, 582–588, 599–600, 654–657), and, based on this information, the F.B.I. conducted an intensive investigation of the petitioner and his activities (R. 56–57).

The Immigration and Naturalization Service (I.N.S.) was first apprised of the information concerning the petitioner on or about June 13, 1957. On that date, Sam Papich, the F.B.I. liaison officer with the I.N.S. (R. 159, 198–199), informed Mario T. Noto, the Deputy Assistant Commissioner for Special Investigations of the I.N.S. in Washington, D.C. (R. 91, 198), that the F.B.I. had information concerning an alien then in the United States who had illegally entered the country from Canada and who was "using fraudulent documents in the United States which professed him to be a citizen, whereas in fact he was an alien" (R. 199). Papich also told Noto that the F.B.I. had considerable information that the suspect was engaged in espionage (R. 199–200). According to Noto's recollection, Papich, during this conversation,

had referred to the petitioner under several names, including Abel, Goldfus, and Collins (R. 200–201). Immediately following the conversation, Noto had a search of I.N.S. records made for any available information pertaining to an individual known by any of these names (R. 201–202, 214).

Sometime between June 18 and 20, 1957, Noto received from Papich additional information concerning the case, including the full names or aliases used by the suspect, that the suspect had used a birth record under an assumed name, that he had entered the United States from Canada, that he had admitted to various persons that he was in the United States illegally, that he held a rank in the Soviet espionage apparatus, and that he had engaged in espionage activities in this country (R. 203–204).

On June 19 or 20, 1957, Noto told the F.B.I. agents that "I had determined that I had enough evidence upon which I was going to order that Mr. Abel would be arrested" for the deportable offense of "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act" and that "I would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes" (R. 207; see R. 208, 210).

Late in the afternoon of June 20, 1957, Robert Schoenenberger and Lennox Kanzler, two other I.N.S. officers (R. 91–92, 157–158), were briefed about the case by Papich and other F.B.I. agents (R. 91–92, 158–159, 160–161) and were given an F.B.I. report describing this "person who had entered the United

States illegally in 1949 from Canada at an unknown port"[2] (R. 125, 131–132, 161, 213). The report stated that a "confidential informant who is a defected Soviet intelligence agent" had told the F.B.I. that a man known to him as "Mark" had been in Soviet espionage work since 1927, was presently "a colonel in the Soviet State Security Service," had been operating as an espionage agent in the United States since 1949 when he entered from Canada, and "has never obtained any documents which would tend to legalize his status in the United States." The report further said that an F.B.I. investigation disclosed that "Mark" was operating in the United States under the names of Emil R. Goldfus and Martin Collins. After reviewing all their information, Noto, Schoenenberger, and Kanzler concluded that they had sufficient evidence to draw up in the name of "Martin Collins" an order to show cause why the recipient should not be deported, and also a warrant of arrest for deportation (R. 33–37, 106–107, 115). Accordingly, Kanzler, pursuant to Noto's orders, prepared these documents (R. 163).

About 3:00 p.m. the same day, Schoenenberger was instructed to go to New York to confer with John Murff, the Acting District Director of the I.N.S., and "to convey to him all of the information which we had [concerning the petitioner] which could not be communicated on the telephone" for the purpose of

[2] This report was originally classified as secret and was placed under seal by the trial court at the time it was made a part of the record in the case during the pretrial hearing (R. 237–238). As the report has since been declassified by the F.B.I., copies have been lodged with the Court and sent to the petitioner's counsel.

asking him to sign an order to show cause addressed to the petitioner under the name of Collins and a warrant for his arrest (R. 91–92, 211, 213).

Schoenenberger and Kanzler, with two other I.N.S. investigators, Farley and Boyle, conferred with Murff. Schoenenberger produced the F.B.I. report (R. 125, 131–132) and "furnished [Murff] the information that had been furnished by the Federal Bureau of Investigation" (R. 95). After considering this information, Murff "concluded that an order to show cause and a warrant of arrest should be issued and served on the [petitioner]" (R. 95; see R. 108). Murff accordingly signed these documents at approximately midnight on June 20 (R. 96, 108). Schoenenberger, at the request of the F.B.I., agreed to give the latter an opportunity to interview the petitioner before his arrest to ascertain whether he would "cooperate" (R. 97, 98–99, 140).

B. THE PETITIONER'S ARREST

F.B.I. agents knocked on the petitioner's door at approximately 7:02 a.m. the next morning, June 21, 1957. The petitioner answered "Just a minute" or "Just a moment", and then opened the door. The agents walked in, identified themselves, and proceeded to question him for approximately half an hour (R. 175-185, 241–242). At the completion of this interview, I.N.S. officers Farley and Boyle were informed that they could enter to effect the petitioner's arrest (R. 137–140, 189–190, 242). They entered the room, which was a small single hotel room, approximately twelve feet by eight feet in size with an adjoining bath (R. 140), at approximately 7:25 a.m. (R. 189–190).

Boyle, after establishing the identity of the person in the room as being Martin Collins, served him with the immigration warrant of arrest (R. 33, 54, 67, 189). He read to the petitioner a portion of the order to show cause and asked him to sign it—which the petitioner did (R. 53–54, 67–68, 140–141, 189–190). The petitioner was also advised by Boyle that he had a right to counsel (R. 189). At approximately 7:30 a.m., Farley and Boyle were joined by Schoenenberger and Kanzler (R. 65, 68, 101, 142, 165, 662), who entered the room to supervise the taking of the petitioner into custody and the examination of "his personal effects in an effort to locate documentary evidence of alienage" (R. 65, 102).

SUMMARY OF ARGUMENT

I

(*a*) Although the Court has asked counsel to discuss the legality of the petitioner's arrest, the Court has also raised the question of whether that issue is properly before the Court. We urge that it is not. Although constitutional considerations are involved, the specific problem before the Court is the admissibility of seven exhibits. The petitioner not only failed to object to their use on the basis of the illegality of the arrest; at the hearing on the motion to suppress, his counsel specifically disclaimed any attack on the arrest. If the point had been raised at that time, the government could have attempted to meet the issue and, if unsuccessful, the evidence would have been excluded. But the case could have continued without this evidence. For the petitioner to

wait until now is, in effect, to invite error (by failing to challenge the arrest in the trial court) and then seek a new trial on the basis of that "error" when all else fails. This is not permissible.

(*b*) Under the Immigration and Nationality Act of 1952 and the regulations thereunder, deportation proceedings are now commenced by orders to show cause issued by district directors on applications by agents who must have a prima facie case of deportability. Arrests pending deportation on warrants of the district directors are effected only when it is necessary to prevent an alien from absconding or to prevent him from illegal activity. Cf. *Carlson* v. *Landon*, 342 U.S. 524. The warrant in this case complied with the procedure provided under the statute. The F.B.I. had checked on information concerning the petitioner given it by a defecting Soviet agent and had uncovered sufficient corroborating evidence to justify bringing the case to the attention of the Immigration Service. The latter's check showed that petitioner had not reported his address, as was required by law, and was therefore prima facie deportable. These facts, supported by the F.B.I. report, were laid before the District Director in New York. His action in issuing the arrest warrant was fully justified under these circumstances.

(*c*) The requirements of the Fourth Amendment that warrants be issued on the basis of probable cause, supported by oath or affirmation, are inapplicable to deportation proceedings. At the last term, this Court reviewed the history of the Amendment in *Frank* v.

Maryland, 359 U.S. 360, and determined that Fourth Amendment warrants are required only in criminal proceedings. Deportation is not criminal in nature and this Court has consistently refused to engraft the restrictions of criminal procedure on its processes. Equally, Congress has from the beginning authorized immigration arrests without Fourth Amendment warrants, and the statutory procedure has been assumed to be valid in many deportation cases reviewed by this Court. Whenever attacked in the lower courts, such warrants have been upheld.

(*d*) In any event, the arrest here would not be illegal under the Fourth Amendment by reason of the lack of formality in the issuance of the warrant since it is well established that, even in the absence of any warrant at all, an arresting officer may take a person into custody if he has probable cause to believe that he is guilty of a crime. *Draper* v. *United States,* 358 U.S. 307. Here, the very facts which constituted the prima facie case brought to the attention of the District Director were in the possession of the arresting officers and went beyond what is necessary to constitute probable cause. Therefore, as in criminal cases, the arrest was fully justified on the basis of probable cause to believe that the petitioner was deportable. The only question as to the justification possessed by the arresting officials which the petitioner raises is that the arrest was a subterfuge to take the petitioner into custody for the F.B.I., and its purposes. But the specific findings of the trial court, affirmed by the court below, dispose of that issue.

(*c*) As to whether the arrest violated due process, the arguments that sustain the arrest on the basis of probable cause likewise sustain it against a claim of lack of due process. Certainly, due process does not turn solely on the presence or absence of an oath. The regular immigration procedures were followed and they appear appropriate and fair in view of the nature of the proceedings involved.

II

The Court has also invited counsel to consider the legality of the arrest independently of the warrant. In that connection, we urge that the arrest was legal on the ground that a misdemeanor was in the process of commission in the very presence of the arresting officers, justifying them in making the arrest wholly apart from their authority in connection with the deportation proceeding. It is entirely appropriate that this contention as to the arrest be presented at this stage of the case for the first time since the issue of the legality of the arrest was not raised earlier. This is therefore the first opportunity the government has had to present the argument. Moreover, it does not depend on facts which could have been better presented or refuted below.

The petitioner's misdemeanor consisted of violating 8 U.S.C. 1306(b), which imposes a criminal penalty for the failure of an alien to report his address to the Attorney General. Such a violation is a continuing

offense. Cf. *United States* v. *Cores*, 356 U.S. 405. Since the offense was occurring in their presence, the arresting officers had authority to take the offender into custody. Where there are several possible and reasonable grounds for making the arrest the legality of the arrest should not depend upon whether or not the arresting officer happens to choose a particular valid ground. Cf. *United States* v. *Rabinowitz*, 339 U.S. 56, 60.

ARGUMENT

In dealing with the questions listed in the Court's order of March 23, 1959 (*supra*, pp. 1–2), we shall discuss in Point I the question of the validity of the Immigration Service arrest warrant, including in that discussion the portion of Question 3 which deals with whether the validity of the arrest is properly before this Court. In Point II, we shall answer the question on the validity of the arrest independent of the warrant, including under this point the answer to that portion of Question 3 which deals with whether that question is properly before the Court. As noted above, we shall not repeat our prior argument relating to the search and seizure as incidents of the arrest.

I

THE INTRODUCTION OF THE EVIDENCE SEIZED DURING THE SEARCH OF THE PETITIONER'S ROOM SHOULD NOT BE HELD TO BE ERROR ON THE GROUND THAT THE IMMIGRATION WARRANT WAS INVALID AND THEREFORE DID NOT CONSTITUTE A VALID BASIS FOR THE ARREST

A. THE PETITIONER'S DISCLAIMER BEFORE THE TRIAL, AND LATER, OF ANY ATTACK ON THE VALIDITY OF THE ARREST PRECLUDES THE COURT FROM UPHOLDING ANY OBJECTION TO THE EVIDENCE ON THAT GROUND NOW

Although the questions asked by the Court involve basic issues of constitutional law, it is important to note the setting in which these questions arise. Specifically in issue is the question of whether or not seven items of evidence should have been admitted over the petitioner's objection.[3] If the issue as to the

[3] The seven items were (1) a fictitious birth certificate in the name of "Martin Collins" (Ex. 78); (2) a spurious birth certificate in the name of "Emil Goldfus" (Ex. 79); (3) an International Certificate of Vaccination dated May 23, 1957, in the name of Martin Collins (Ex. 80); (4) an East River Savings Bank bank book in the name of E. R. Goldfus (Ex. 81); (5) a strip of graph paper containing a coded message (Ex. 77); (6) a piece of wood, wrapped in sandpaper, containing a cipher pad (Ex. 88); and (7) a hollowed-out wooden pencil containing microfilm (Ex. 87).

The overwhelming nature of the remainder of the government's evidence supports the conclusion that only three of the items seized during this search were prejudicial to the petitioner. Admittedly, the graph paper containing a coded message (Ex. 77; R. 38, 49, 665–666), the hollowed-out piece of wood containing a cipher pad (Ex. 88; R. 693–695), and the hollowed-out pencil containing microfilm with a radio receiving schedule in Russian (Ex. 87, 98) are so obviously related to the equipment of an espionage agent that their effect was likely to be prejudicial. But, if we assume that the petitioner's arrest was legal and that I.N.S. officers have any authority to search

validity of the arrest had been raised at or before the trial, the government would have been in a position to make an additional showing of facts to support the validity of the arrest (see *United States* v. *DiRe*, 332 U.S. 581, 588; *Giordenello* v. *United States*,

incident to a valid I.N.S. arrest, then it seems clear that the seizure of these three items was legal. The graph paper was seized on the petitioner's person as he was trying to conceal it in his sleeve (see the argument in our 1958 Brief, pp. 57–58), and the hollowed-out wood and pencil were found in the wastebasket after the petitioner had voluntarily abandoned the room (see our 1958 Brief, pp. 58–60). The other four items were clearly cumulative. First, the F.B.I. report given to the I.N.S. before the arrest shows that the F.B.I. knew that the petitioner was using the names of Collins and Goldfus even before his arrest (*supra*, p. 7). Second, considerable other evidence was introduced by the government at the trial showing that the petitioner was using these names, including a lease and letter signed by the petitioner as Goldfus (Exs. 50, 51; R. 544–546); rental records pertaining to the petitioner's rooms at 252 Fulton Street in the name of Goldfus (Ex. 49; R. 542–543); testimony by the superintendent and two other tenants at 252 Fulton Street that they knew the petitioner as Goldfus (R. 548, 561–563, 707); two signature cards of the National City Bank in the name of Goldfus, together with two letters of recommendations referring to the petitioner as Goldfus (Ex. 71; R. 630–631); a subsequent signature card of the National City Bank, together with a ledger sheet in the name of Goldfus (Ex. 72; R. 631–634); a signature card showing that the petitioner registered at the Benjamin Franklin Hotel as Goldfus (Ex. 73; R. 634); records of the Hotel Latham showing that the petitioner occupied room 839 in the name of Collins (Ex. 76; R. 658); the testimony of the manager of the Hotel Latham that the petitioner registered as Collins (R. 657–658); and, most important, a transcript of the I.N.S. deportation hearing at which the petitioner admitted that he had been using the names of Goldfus and Collins (R. 690).

Even if the later search of room 509 at 252 Fulton Street was dependent on the arrest, search and seizure in the Hotel Latham (despite the government's argument to the contrary

357 U.S. 480, 487–488), and, if the factual and constitutional issues had been decided adversely to it, the seven items of evidence would have been excluded. The government could then have proceeded with the evidence it still had, which on the record appears to have been overwhelming, or it could have attempted to supplement the record to replace the excluded items with other legally admissible evidence. We urge that in considering whether the issue of the vali-

(see our 1958 Brief, p. 60, n. 24)), it is clear that the search of room 509 was not based on the seizure of the four documents mentioned above. The affidavit of application for the search warrant for room 509 mentioned the petitioner's arrest, the pencil taken from the wastebasket, and the supervening indictment of the petitioner charging him with conspiracy to commit espionage by secreting microfilm in hollowed-out objects (R. 264–265)—none of which relates to the four documents.

Thus, if the Court should uphold the petitioner's arrest, and the seizure of the items taken from the hotel room with the exception of the four documents, it may fairly be said that the illegal seizure involved only cumulative evidence. In *Segurola* v. *United States*, 275 U.S. 106, 111, this Court stated: "As there was no evidence introduced by the defendants to refute or deny the testimony unobjected to, which clearly showed the illegal transportation of the liquor [which the petitioner alleged had been obtained by an illegal search] and sustained the verdict, the admission in evidence of the liquor * * * worked no prejudice for which a reversal can be granted." Under similar circumstances the Sixth Circuit upheld a conviction, even though the challenged evidence was in fact illegally seized, on the ground that cumulative evidence is not prejudicial. *Laughter* v. *United States*, 259 Fed. 94, 100, certiorari denied, 249 U.S. 613. See also *Agnello* v. *United States*, 269 U.S. 20, where the Court, in reversing the conviction, first answered the government's contention that the disputed evidence was not prejudicial (*id.* at 26–27), by finding that the evidence was in fact prejudicial (*id.* at 35, 36); *Weeks* v. *United States*, 232 U.S. 383, 398, where the Court reversed because "prejudicial error was committed."

dity of the arrest is still open for consideration the Court must weigh the prejudice to the government resulting from the fact that the issue was not raised at a time when the effect of sustaining it, if it is sustainable, would have been relatively minor; if the error is to be corrected now, the judgment will have to be reversed after the jury has convicted and the court below affirmed. To be sure, some errors are so vital to a proceeding and so pervasive of the entire trial, such as for example the absence of counsel or the use of a confession illegally obtained, that it is never too late to notice them and correct the injustice. Cf. *Gambino* v. *United States*, 275 U.S. 310, 319; *Johnson* v. *Zerbst*, 304 U.S. 458; *Screws* v. *United States*, 325 U.S. 91, 107. Such is clearly not the case here for, although we make no formal argument of "harmless error," the items of evidence involved were clearly but a small part of the government's entire case.

The record in this case indisputably demonstrates that the petitioner has not, in any previous stage of these proceedings, challenged the validity of the warrant of arrest issued by the Immigration and Naturalization Service to authorize his detention pending determination of his deportability. In an affidavit filed in support of the motion to suppress in the district court, the petitioner's chief counsel succinctly stated the basis of his request for a hearing on the motion (R. 72):

> *The defendant* maintains that the true objective of the Department of Justice in conducting the search and seizure at the Hotel Latham

on June 21, 1957, was to obtain any espionage material possessed by a suspected Soviet agent in Room 839;

The Government, in the affidavits most recently submitted in its behalf, apparently denies this contention.

Subsequently, the petitioner, at the hearing on his motion to suppress, relied exclusively on the illegality of the search and seizure themselves and made no claim that the search and seizure were invalid on any theory of the invalidity of his arrest (see, *e.g.*, R. 116–117, 125, 126–127, 129–130, 152, 154, 171, 227). Thus, Judge Byers, in his opinion denying the petitioner's motion, paraphrased the petitioner's contentions as follows (R. 242–243):

(1) The search incidental to his arrest was illegal since a deportation proceeding is not criminal in nature.

(2) If the foregoing is decided against him, that the search should be deemed to be illegal and not made in good faith, for the reason that the Department of Justice used the deportation procedure and the incidental arrest in bad faith; that the ultimate purpose was to secure evidence as the result of a search which could be used in a prosecution for the alleged violation of our espionage laws, although at the time that the arrest and search took place, the Department was not in a legal position to institute a criminal prosecution based upon the alleged violation of the espionage statutes.

In fact, not only did the petitioner fail to urge illegality of the arrest as a ground for his motion to

suppress, but, in arguing the motion, it was specifically conceded that the arrest was legal (R. 126–128):

> The Court: They were not at liberty to arrest him?
>
> Mr. Fraiman [petitioner's counsel]: No, Your Honor. They were perfectly proper in arresting him. We don't contend that at all. As a matter of fact, we contend *it was their luty to arrest this man as they did.* I think * * * it showed admirable thinking on the part of the F.B.I. and the Immigration Service. We don't find any fault with that.
>
> Our contention is that although they were permitted to arrest this man, and in fact, *had a duty to arrest this man in a manner in which they did,* they did not have a right to search his premises for the material which related to espionage.
>
> * * * * *
>
> The Court: He was properly arrested.
>
> Mr. Fraiman: *He was properly arrested, we concede that,* your Honor. [Emphasis added.][4]

Similarly, the petitioner did not challenge the validity of the warrant or otherwise urge the illegality of his arrest in the court of appeals. See Brief for Appel-

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[4] Earlier, the following colloquy had occurred between counsel and the court (R. 116–117):

> The Court: You contend that there was no sufficient cause for the Immigration Department to cause this arrest?
>
> Mr. Fraiman: Your honor, I can't make that contention.
>
> The Court: Of course you can't.
>
> Mr. Fraiman: Until I ask——
>
> The Court: Obviously that is not so. This is not your position, is it?
>
> Mr. Fraiman: Not at this time.

lant, C.A. 2, No. 24968. Under these circumstances, both the trial court and the court below assumed the validity of his arrest and did not consider or decide whether the Fourth Amendment is applicable to immigration arrest warrants or, if the Fourth Amendment does apply whether the petitioner's arrest was nevertheless valid on the basis of probable cause. See 155 F. Supp. 8; 258 F. 2d 485.[5]

This Court specifically stated in *United States* v. *Atkinson*, 297 U.S. 157, 159:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * * *

See also, *United States* v. *Socony-Vacuum Oil Co.*, Inc., 310 U.S. 150, 239; *Johnson* v. *United States*, 318 U.S. 189, 200; *Az Din* v. *United States*, 232 F. 2d 283 (C.A. 9), certiorari denied, 352 U.S. 827; *United States* v. *De Marie*, 226 F. 2d 783 (C.A. 7), certiorari

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[5] The fact that the petitioner did not intend to challenge the validity of the arrest below is further confirmed by the petitioner's position in this Court. The petition for certiorari did not contest the legality of the warrant and, although the government dealt with the issue in its original brief on the merits (pp. 30–33), the petitioner's reply brief unequivocally denied that he was questioning the validity of the arrest (Pet. Reply Br. 3). We do not refer to this position of the petitioner in his reply brief in order to bind the Court to his position here (since the issue has been specifically raised by the Court's own order for reargument), but because it confirms our assertion that the petitioner did not intend to, and did not, raise that issue below.

denied, 350 U.S. 966; *Wheeler* v. *United States*, 165 F. 2d 225 (C.A.D.C.), certiorari denied, 333 U.S. 829.[6] These principles are equally applicable where an objection, though raised at the proper time in the trial court, did not include the specific ground relied upon on appeal. See 1 Wigmore, *Evidence* (3d ed., 1940), § 18; *e.g.*, *Litton* v. *United States*, 177 F. 2d 416 (C.A. 8). Therefore, even if the question of the good faith of the arrest was impliedly included in the petitioner's challenge to the good faith of the search and seizure (despite his counsel's explicit statements to the contrary, *supra*, pp. 19, n. 4, 20, n. 5), the general validity of an I.N.S. arrest warrant under the Fourth Amendment is a distinct issue and was not raised.

The government recognizes, of course, that the

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[6] See also *United States* v. *Jones*, 204 F. 2d 745 (C.A. 7), certiorari denied, 346 U.S. 854, involving a situation similar to that involved here. In that case a warrant had been issued for the defendant's arrest and, subsequently, a search warrant was procured to search his living quarters. Two federal narcotic officers, who were not in possession of the warrant of arrest, proceeded to the building described in the search warrant and, upon observing the defendant emerging from his apartment, arrested him and searched his person, finding a quantity of heroin. Prior to trial, the defendant moved to suppress as evidence all articles taken from his person on the basis of four specified grounds. On appeal, he urged, as an additional ground for the illegality of the search and seizure that the federal narcotic officers had no authority to make the arrest since they could not execute a warrant of arrest. The court of appeals, however, refused to "give defendant two bites at the same cherry, by declaring erroneous action of the trial court, the fault of which defendant did not see fit to make the court aware, when he had the opportunity to do so." *Id.* at 749. Accord, *Rodriguez* v. *United States*, 80 F. 2d 646, 647–648 (C.A. 5).

Court has the power to notice "[p]lain errors or defects affecting substantial rights" although they were not called to the attention of the trial court or even this Court. Rule 52(b), F.R. Crim. P.; Rule 40(1)(d)(2) of the Rules of this Court; see *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 411–412; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16; *Weems* v. *United States*, 217 U.S. 349, 362. This power, however, is exercised "only in clear cases and in exceptional circumstances," *Kessler* v. *Strecker*, 307 U.S. 22, 34, where "the errors are obvious, or * * * seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, *supra*, 297 U.S. at 160. No such circumstances are present here. In view of the long-standing congressional policy of authorizing executive officers to issue warrants for the arrest and detention of aliens pending a determination of deportability and the fact that for years this practice has received the tacit approval of this and other federal courts (see *infra*, pp. 33–36), the alleged invalidity of such warrants certainly cannot be considered obvious. Moreover, in this case, there was overwhelming evidence of guilt of the conspiracy charged in the indictment, apart from the few items offered in evidence by the government which were obtained as a result of the challenged search. This is not a case, therefore, where, if the alleged error in permitting these items to be introduced is left unnoticed, the fairness, integrity, or public reputation of judicial proceedings would be seriously affected.

As we have already suggested, it is clear from the entire record that the exclusion of all the allegedly

tainted evidence would not have substantially harmed the government's case. In these circumstances, where consideration of the evidence by the jury will not significantly increase the chances of conviction, it is obviously to a defendant's advantage, if he can raise the issue later, to hold back an objection until appeal at a time when it is too late for the prosecution to cure the defect (which it might easily have done if the matter had been raised in the trial court). In this way, he does not substantially lessen his chances of an acquittal in the trial court, and, if the verdict goes against him, he has an additional ground for reversal on appeal. No doubt in the instant case the petitioner did not challenge the validity of his arrest because his counsel believed that the arrest was in fact valid and not because he deliberately desired to retain issues for purposes of appeal. Nevertheless, the motive of trial counsel is a subjective matter which is frequently impossible to ascertain, and as a matter of principle this Court cannot attempt to distinguish between the cases where it will let the objection be raised late, and those where it will not, on the basis of the good or bad faith of counsel. The effect on the trial is the same in either event.

B. THE IMMIGRATION ARREST WARRANT CONSTITUTED A VALID BASIS FOR ARREST UNDER THE LAWS AND THE CONSTITUTION

1. *The warrant complied with applicable law*

(*a*) Section 242(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252(a)) provides that an alien "may, upon warrant of the Attorney General, be arrested and taken into custody" pending a deter-

mination of deportability.[7] This is the direct successor of Section 20 of the Immigration Act of 1917, as amended by the Internal Security Act of 1950 (64 Stat. 1010), which was involved in *Carlson* v. *Landon*, 342 U.S. 524, where this Court upheld the detention of a deportable alien arrested by the Immigration Service pursuant to a warrant under that section.

Since 1956, deportation proceedings have been regularly commenced by orders to show cause issued by the district directors pursuant to applications which, by formal instruction, may be made only when the I.N.S. agent applying for the order has a prima facie case of deportability (8 C.F.R. 242.1; Immigration and Naturalization Service Operations Instructions, Part 242–1, Appendix, *infra*, pp. 52–53). Rule 242.2 (a) (8 C.F.R. 242.2(a)) of the Rules under the Act provides:

> At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a dis-

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[7] Authority to delegate the powers vested in the Attorney General by the Act is granted by Section 103(a) of the Act (8 U.S.C. 1103(a)) and it was contemplated that general responsibility would be placed in the Commissioner of Immigration and Naturalization (8 U.S.C. 1103(b)). The legality of such delegation has been upheld. *Cabrera* v. *Savoretti*, 252 F. 2d 294 (C.A. 5); *Wolf* v. *Boyd*, 238 F. 2d 249 (C.A. 9), certiorari denied, 353 U.S. 936; *United States* v. *Vivian*, 224 F. 2d 53 (C.A. 7).

> trict director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *."

It is clearly the provisions of the Immigration and Nationality Act and these regulations which govern in this case rather than the provisions for warrants in criminal cases provided by 18 U.S.C. 3041 and Rules 3 and 4 of the Federal Rules of Criminal Procedure. Deportation proceedings, as this Court has repeatedly recognized, are civil in nature and not criminal proceedings. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Bilokumsky* v. *Tod*, 263 U.S. 149; *Carlson* v. *Landon, supra*, 342 U.S. 524; *Harisiades* v. *Shaughnessy*, 342 U.S. 580.[9]

Taken together, the regulations and Operations Instructions establish the following procedure: the deportation proceeding is commenced by the issuance of an order to show cause based on evidence establish-

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[9] Warrants for arrest are now applied for only in the few cases where there is danger that the alien will abscond or where his detention is necessary to promote the national security. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959), §§ 5.3a, 5.4a.

A single district court, while recognizing the civil nature of deportation proceedings, has said that the Federal Rules of Criminal Procedure "as to the manner of executing a warrant and making a return thereon state a proposition general in its application." The court, nonetheless, held that the warrant of arrest in that case, which had been issued by I.N.S. officers "conforms to Rule 4(b)" despite the fact that Rule 4(b) explicitly requires that a warrant be signed by a Commissioner. *Ex Parte Sentner*, 94 F. Supp. 77, 79 (E.D. Mo.). Thus, the district court apparently intended to hold that the Rules are applicable as a guide to determining proper procedure in deportation cases in the absence of specific provisions to the contrary in other statutes and regulations.

ing a prima facie case. The alien, however, is not arrested unless, in addition to the determination that there is a prima facie case, the district director decides that his arrest is necessary or desirable.

(*b*) This Court has defined prima facie evidence as such evidence as "in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Pet. 622, 632 (see also *infra*, pp. 43–44). The evidence presented to Acting District Director Murff amply provided prima facie evidence that the petitioner was an alien who had failed to notify the Attorney General of his address as required by Section 265 of the Immigration and Nationality Act (8 U.S.C. 1305) and was therefore deportable under Section 241 (8 U.S.C. 1251(a)(5)).

The record shows that Remo Hayhanen had described to the F.B.I. the petitioner's espionage activities in the United States prior to the petitioner's arrest (see R. 56–57). Hayhanen's account had been checked by the F.B.I. and in numerous respects was confirmed (*supra*, p. 5). Thus, the F.B.I. could reasonably consider Hayhanen as a reliable informant. He gave to the F.B.I. information that the petitioner was an alien who was purporting to be an American citizen (R. 199).[10] Moreover, Hayhanen told the F.B.I. that the petitioner "has never obtained any

[10] Although the record does not state that it was Hayhanen who gave the F.B.I. this information, he must have been at least the original source. The F.B.I. report, later given to the I.N.S. officials, states that Hayhanen informed the F.B.I. that the petitioner was a long-time Soviet espionage agent (*supra*, p. 7).

documents which would tend to legalize his status in the United States" (F.B.I. report; see *supra*, p. 7).

The F.B.I. gave I.N.S. Deputy Assistant Commissioner Noto its information that the petitioner was an alien (R. 199). Moreover, Noto was told that the petitioner had entered the country illegally, was using fraudulent documents professing that he was a citizen, and that he was engaged in espionage (R. 199–200; see R. 203–204). These latter facts strongly suggested that the petitioner had not notified the Attorney General of his address. This suggestion was checked against the I.N.S. files (R. 200–202, 214).

Subsequently, I.N.S. agents Schoenenberger and Kanzler were given an F.B.I. report which stated that a "confidential informant who is a defected Soviet intelligence agent" has told the F.B.I. that "Mark" (the petitioner) had been a Soviet espionage agent since 1927 although he had only operated in the United States since 1949, and that "Mark has never obtained any documents which would tend to legalize his status in the United States." The report further stated that an F.B.I. investigation had disclosed that "Mark" was using the aliases of Martin Collins and Emil Goldfus. In addition, Schoenenberger and Kanzler were told by Papich and other F.B.I. agents the "information that had been received from the Federal Bureau of Investigation" (R. 92; see R. 158, 160–161).

Schoenenberger was instructed "to convey to [Murff] all of the information which we had [concerning the petitioner] which could not be communicated on the telephone," (R. 211), and he testified at the pre-trial hearing that he had "furnished [Murff] the information that had been furnished by the Federal Bureau of Investigation" (R. 95). Murff was also given the F.B.I. report (R. 125, 131–132).

In short, the record shows that the F.B.I. had reliable information that the petitioner was an alien and that he had not notified the Attorney General of his address; that this information was conveyed orally by the F.B.I. to I.N.S. Assistant Deputy Commissioner Noto who confirmed that the petitioner had not notified the Attorney General of his address; that this information was then conveyed orally by Noto and several F.B.I. agents and in an F.B.I. report to I.N.S. agents Schoenenberger and Kanzler; and that this information was given to Acting District Director Murff orally by I.N.S. agents Schoenenberger and Kanzler and in the F.B.I. report. Thus, Murff clearly had enough information to constitute a prima facie case of a deportable offense.[11] And there can

[11] Although the government submits that the record shows that Murff had evidence constituting a prima facie case, the evidence introduced by the government on this issue was admittedly only an inadvertent by-product of the government's demonstration that the search and seizure were made in good faith. The government did not introduce evidence directly on this issue because the validity of the petitioner's arrest was not challenged by the petitioner in the trial court (see *supra*, pp. 17–20, ns. 4, 5). Thus, if the record on this issue is found to be inconclusive, the validity of the petitioner's arrest depends on questions of fact as to which the government has never had the

hardly be any doubt that the arrest and detention of so important an espionage agent was "necessary" and "desirable" during the deportation proceedings.

2. *The Fourth Amendment is inapplicable to arrests in deportation proceedings*

(*a*) The requirements imposed by the Fourth Amendment upon the issuance of warrants of arrest—*i.e.*, that they be based on probable cause supported by oath or affirmation—are limited in their application to warrants of arrest issued in criminal cases; they have not been and should not be extended by the Court to warrants issued in deportation cases. Both the history of the Fourth Amendment, and the traditional methods authorized by Congress to effectuate the expulsion from this country of undesirable aliens since almost the very founding of the Republic, militate strongly against a broader construction.

Very recently, in *Frank* v. *Maryland*, 359 U.S. 360, the Court had occasion to re-examine the history of the Fourth Amendment and to confirm the long-established view that the safeguards contained in the Fourth Amendment were intended to apply only to criminal prosecutions. As the Court there noted (359 U.S. at 363, 365):

> The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was

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opportunity to introduce evidence. Under such circumstances, an issue involving factual issues may not be raised for the first time on appeal. *United States* v. *DiRe*, 332 U.S. 581, 588; *Giordenello* v. *United States*, 357 U.S. 480, 487–488; see also *supra*, pp. 14–23.

meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence *of crime or of illegally imported goods.* The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.

* * * * *

* * * Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in *criminal prosecutions or for forfeitures* that the great battle for fundamental liberty was fought. * * *

[Emphasis added.]

Despite the all-inclusive language of the Fourth Amendment, the courts have consistently refused to extend its requirements to non-criminal processes and proceedings. For example, in the *Frank* case, this Court held that the amendment does not prohibit inspections of dwelling houses without a warrant, for the purpose of ascertaining compliance with local health and safety regulations. Earlier, in *Boyd* v. *United States,* 116 U.S. 616, 624, the Court observed that:

The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a

> judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution * * *.

It has been held that the Fourth Amendment does not require a warrant for the search of business premises and the seizure of goods found therein to be used as evidence in a proceeding to revoke a manufacturer's license. *Camden County Beverage Co,* v. *Blair,* 46 F. 2d 648, 649–651 (D. N.J.). Nor does the requirement of the Amendment that warrants be issued only on the basis of sworn testimony apply to distress warrants issued to effectuate the collection of delinquent taxes, *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 285, 286, or to attachments to authorize seizure of adulterated and mislabled food and drugs in violation of law. *United States* v. *Eighteen Cases of Tuna Fish,* 5 F. 2d 979 (W.D. Va.); *United States* v. *62 Packages, Etc.,* 48 F. Supp. 878, 884 (W.D. Wisc.), affirmed, 142 F. 2d 107 (C.A. 7).

In *Fong Yue Ting* v. *United States,* 149 U.S. 698, 730, this Court explained in clear and unambiguous language, that a deportation proceeding

> * * * is in no proper sense a trial and sentence for a crime or offence. * * * It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

See also, *e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228; *Mahler* v. *Eby*, 264 U.S. 32; *Carlson* v. *Landon*, 342 U.S. 524, 537. Continuing, the Court stated in *Fong Yue Ting* that "the provisions of the Constitution, securing the right of trial by jury, and *prohibiting unreasonable searches and seizures*, and cruel and unusual punishments, have no application" (emphasis added). While the procedures to be followed in deportation proceedings must be reasonable and must afford the alien a fair hearing (see *infra*, pp. 42–45), they need not be the same procedures as are required for a criminal trial.

In recognition of the civil nature of deportation proceedings, the courts have consistently refused to engraft upon them constitutional protections limited to criminal cases. This Court has held that a deportation proceeding is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments. *Zakonaite* v. *Wolf*, 226 U.S. 272, 275. Accordingly, the right of trial by jury (*Fong Yue Ting* v. *United States*, *supra*), the privilege against self-incrimination (*Bilokumsky* v. *Tod*, 263 U.S. 149; *Loufakis* v. *United States*, 81 F. 2d 966 (C.A. 3); *United States* v. *Lee Hee*, 60 F. 2d 924 (C.A. 2)), and the defense of former jeopardy (*Bridges* v. *Wixon*, 144 F. 2d 927 (C.A. 9), reversed on other grounds, 326 U.S. 135; *Sire* v. *Berkshire*, 185 Fed. 967 (W.D. Tex.)), are inapplicable to such proceedings. And the provisions of the Eighth Amendment guaranteeing the right to reasonable bail and prohibiting cruel and unusual punishments are likewise inapplicable. *Carlson* v. *Landon*, *supra*; *United States ex rel. Cir-*

cella v. *Sahli*, 216 F. 2d 33 (C.A. 7), certiorari denied, 348 U.S. 964. Moreover, the Court has repeatedly upheld the power of Congress to enact legislation declaring as grounds for deportation the past misconduct of aliens, despite the prohibition contained in Article I, Section 9, of the Constitution against the passage of *ex post facto* legislation. *Bugajewitz* v. *Adams*, 228 U.S. 585; *Mahler* v. *Eby*, *supra*; *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522.[32]

(*b*) The history of the deportation legislation enacted by Congress demonstrates a consistent pattern of placing power exclusively in the hands of the President or subordinate officers of the executive branch of the government to arrest and detain aliens,[33] pending a determination of deportability: Cf. Gordon and Rosenfield, *Immigration Law and Procedure* (1959), ch. V, § 5.1. The first deportation statute specifically conferred the power to arrest deportable aliens upon the President. Act of June 25, 1798, c. 58, § 2, 1 Stat. 571. No further deportation statutes were enacted until many years later, but when Congress in the latter part of the nineteenth century again turned its attention to the problem it vested in the Secretary of the Treasury, who was then charged with the administration of the immigration laws, the

[32] Conversely, the Administrative Procedure Act of 1946, 5 U.S.C., § 1001, *et seq.*, was held applicable to deportation cases in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

[33] As described above (*supra*, pp. 23–25), arrest is no longer the normal procedure for commencing deportation proceedings but is used when necessary to effectuate the purposes of the Act.

authority, "in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of [the] law, to cause such immigrant * * * to be taken into custody * * *." Act of February 23, 1887, c. 220, 24 Stat. 414, as amended by the Act of October 19, 1888, c. 1210, 25 Stat. 566. A similar provision was enacted in 1903. Act of March 3, 1903, c. 1012, § 21, 32 Stat. 1218. Since 1907, every new deportation statute has specifically provided that an alien may be arrested and taken into custody under the authority of a warrant issued by the head of the executive department charged with the administration of the statute. See Act of February 20, 1907, c. 1134, § 20, 34 Stat. 904; Act of February 5, 1917, c. 29, § 19, 39 Stat. 889; Act of October 16, 1918, c. 186, § 2, 40 Stat. 1012; Act of May 10, 1920, c. 174, 41 Stat. 593; Internal Security Act of 1950, c. 1024, Title I, § 22, 64 Stat. 1008; Immigration and Nationality Act of 1952, c. 477, Title II, § 242, 66 Stat. 208 (8 U.S.C. 1252).

The only federal courts which have considered objections to the issuance of arrest warrants in deportation cases similar to those raised in this case have sustained the validity of such warrants. In *Colyer* v. *Skeffington*, 265 Fed. 17 (D. Mass.), reversed on other grounds *sub nom. Skeffington* v. *Katzeff*, 277 Fed. 129 (C.A. 1), the district court held that the fact that warrants of arrest in deportation cases were issued by immigration authorities, relying on information received from the Federal Bureau of Investigation, did not invalidate such warrants. In *Podolski* v. *Baird*, 94 F. Supp. 294 (E.D. Mich.), the validity of a deportation arrest warrant was upheld against an

objection that it was invalid because not judicially issued. And in *Ex parte Avakian*, 188 Fed. 688, 692 (D. Mass.), the warrant of arrest was held to be "good and valid" despite the contention that it was illegally issued because the application for its issuance was not supported by oath or affirmation as required by the Fourth Amendment. Accord, *Ranieri* v. *Smith*, 49 F. 2d 537 (C.A. 7), certiorari denied, 284 U.S. 657.

Moreover, although this Court has not previously been asked to rule specifically on the application of the Fourth Amendment to warrants of arrest in deportation cases, it has for almost three quarters of a century consistently upheld deportation proceedings initiated by the arrest of the alien under the authority of such administratively issued warrants—without any suggestion that such warrants were invalid. *E.g.*, *The Japanese Immigrant Case*, 189 U.S. 86, 97–99; *Zakonaite* v. *Wolf*, *supra*, 226 U.S. 272; *Bilokumsky* v. *Tod*, *supra*, 263 U.S. 149, *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. 580; *Galvan* v. *Press*, *supra*, 347 U.S. 522. And in *Carlson* v. *Landon*, *supra*, 342 U.S. 524, the Court held that an alien may be held in the custody of the Attorney General without bail pending the determination of his deportability. The petitioners there had been arrested pursuant to an arrest warrant issued by the Service. While the petitioners challenged only the denial of bail not the basis of their arrest, the holding of this Court that their continued custody was valid necessarily assumed that their arrest was proper.

The legislative construction of the Fourth Amendment—that the issuance of warrants of arrest in de-

portation cases by executive officers was not prohibited—commencing early in our history when the first occasion for this manner of proceeding arose, continuing without exception thereafter, and repeatedly relied upon by the executive, legislative, and judicial branches, is entitled to great weight in deciding whether the issuance of such warrants is constitutionally prohibited. See *Frank* v. *Maryland*, 359 U.S. 367–370; cf. *McGrain* v. *Daugherty*, 273 U.S. 135, 156–157; *Myers* v. *United States*, 272 U.S. 52, 111–175; *Ex Parte Grossman*, 267 U.S. 87, 118–119; *The Laura*, 114 U.S. 411, 413–416; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 276–280. However important it is to protect aliens from arbitrary action, this Court should not now reverse history by imposing requirements peculiar to the criminal law on the deportation process.[14]

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[14] Conceivably, it might be contended that the Fourth Amendment, while not applicable in deportation proceedings, is applicable when evidence arising out of such proceedings is introduced at a criminal trial. The validity of the arrest, however, and of the consequent search and seizure is measured by these actions themselves; the subsequent introduction of items seized in a criminal trial cannot retroactively make the earlier actions invalid. The government knows of no case in which items legally seized were held to be excludable. Such a holding would mean that, if as a result of a valid arrest and search by I.N.S. officers, an instrumentality of a criminal offense was fortuitously discovered, the item could not be introduced in evidence. Cf. *Harris* v. *United States*, 331 U.S. 145. And presumably such evidence could not even be used as a basis for discovering other evidence. That the arrest and search were, in fact, made in good faith for the deportable offense, and not for the criminal offense on which the petitioner was ultimately tried, is demonstrated in our 1958 Brief (pp. 5–6, 39–47; see also *infra*, pp. 40–41).

3. If the Fourth Amendment applies, the arrest here was not unconstitutional since it was made by an authorized official who had probable cause to believe that the petitioner had committed a deportable offense

(*a*) If, contrary to the contention of the government discussed above (*supra*, pp. 29–36), the Fourth Amendment applies to deportation proceedings, the arrest of the petitioner was, nevertheless, not illegal since it was made by a duly authorized official who had probable cause to believe that the petitioner was subject to deportation. In criminal cases, even if a criminal warrant is lacking or is for some reason invalid, an arrest is still upheld if the arresting officer had probable cause to believe that an offense has been committed. If the application of the Fourth Amendment is transferred from the criminal field to deportation proceedings, it should carry with it this construction which has been developed in its original application.

The most recent acceptance of the principle that an arrest on probable cause is not in violation of the Fourth Amendment even in the absence of a valid warrant is *Draper* v. *United States*, 358 U.S. 307. Though the opinion was not unanimous, the dissent is based on disagreement as to the nature of the information necessary to constitute probable cause, not on the underlying principle. See 358 U.S. 307, 315. Indeed, *Draper* is but the most recent in a long line of Supreme Court cases upholding the right to arrest on the basis of probable cause. See, *e.g.*, *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Brinegar* v. *United States*, 338 U.S. 160, 164, 173–174; *Trupiano*

v. *United States,* 334 U.S. 699, 704–705; *Johnson* v. *United States,* 333 U.S. 10, 15; *Scher* v. *United States,* 305 U.S. 251, 255; *Marron* v. *United States,* 275 U.S. 192, 198–199; *United States* v. *Lee,* 274 U.S. 559, 563; *Agnello* v. *United States,* 269 U.S. 20, 30; *Carroll* v. *United States,* 267 U.S. 132, 156–157, 161.

As has already been shown, Acting District Director Murff of the I.N.S. had more than sufficient evidence to justify his determination of a prima facie case (*supra,* pp. 7–8, 26–29). I.N.S. officers Farley and Boyle, who arrested the petitioner (R. 33, 54, 67, 189), having read the F.B.I. report given by Schoenenberger to Murff and participated in the discussion of the case between Schoenenberger and Murff (R. 95–96, 125), possessed the same information known to Murff. Since the requirements of a prima facie case are, if anything, more rigid than those for probable cause (*infra,* pp. 43–44), it is clear that Farley and Boyle likewise had enough information to constitute probable cause.

The fact that the I.N.S. officers, besides having probable cause to justify the arrest, also had a warrant satisfying the Immigration and Nationality Act (and the regulation promulgated thereunder) is irrelevant for constitutional purposes. In these circumstances, the only question under the Constitution is whether the officers had probable cause. Thus, this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was not sufficient to authorize it, nevertheless the arrest is constitutionally valid as long as the officers in fact had probable cause. *Stallings* v.

Splain, 253 U.S. 339, 342; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; cf. *Marron* v. *United States*, 272 U.S. 192. See also *United States* v. *Gowen*, 40 F. 2d 593, 595 (C.A. 2), reversed on other grounds *sub nom. Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Chin On*, 297 Fed. 531, 533 (D. Mass.). In those cases, the legality of the arrest has been sustained even though, at the time of the arrest, the arresting officers were concededly acting under a defective warrant, which they thought was sufficient,[15] and were not acting pursuant to their authority to arrest without warrant. Thus, neither the insufficiency of the warrant, nor the motivation of the arresting officers, invalidates an arrest which could constitutionally have been, but was not, made without a warrant.

In the instant case, however, unlike in *Stallings* and *Rabinowitz*, the governing statute requires more than mere probable cause. The Immigration and Nationality Act requires that arrests be based on warrant of the Attorney General (or his delegate) (Section 242(a), 8 U.S.C. 1252(a)), unless an alien attempts, in the presence of the officer, to enter the United States illegally or the alien "is likely to escape before a warrant can be obtained" (Section 287(a)(2), 8 U.S.C. 1357(a)(2)). Therefore, the government necessarily relies on the I.N.S. warrant to satisfy this

[15] Moreover, in the instant case, the I.N.S. officers were not purporting to act pursuant to a warrant sufficient under the warrant requirements of the Fourth Amendment, as well as under the statute and regulations. The Service has always acted on the belief that the Fourth Amendment does not apply to non-criminal cases such as deportation proceedings.

statutory requirement. But the fact that the I.N.S. officers, in addition to probable cause, had an I.N.S. warrant does not change the constitutional demands of the Fourth Amendment. The warrant is merely a *statutory* requirement beyond the requirement of probable cause imposed by the Constitution. The statutory requirements are fulfilled by compliance with the Act, and the constitutional requirement is satisfied by the existence of probable cause.

(*b*) The sole contention made by the petitioner in his supplemental brief is that the arrest was made in bad faith and was therefore invalid under the Fourth Amendment. See *Harris* v. *United States*, 331 U.S. 145, 153. This argument is an extension of the claim made by the petitioner in his main brief that the search was made in bad faith (p. 22), which was answered at length in the government's 1958 Brief (pp. 39–47). As our Statement in that brief showed (pp. 4–23), the arrest, like the search and seizure, was made by I.N.S. officers pursuant to their duty to enforce the immigration laws and was not made in order either to hold the petitioner pending trial for espionage or to obtain evidence relating to such crime.

The only new argument advanced by the petitioner (Supp. Br. 4) is that the issue of good faith is conclusively determined by a statement of J. Edgar Hoover in his book, *Masters of Deceit*. There, Mr. Hoover states that the petitioner was arrested at the request of the F.B.I. Assuming that this was so, the issue is not whether the petitioner was arrested at the request of the F.B.I., but whether the arrest was

made as a bona fide step in effecting his deportation. The record indicates that when Hayhanen stated that he would refuse to testify if called to the stand, the F.B.I. and the Department of Justice determined that they no longer had sufficient evidence to press a criminal case of espionage. See 1958 Gov't Br. pp. 5–6, 45–47. However, the F.B.I. could hardly sit back and permit the petitioner to continue his activities; if he could not be prosecuted and imprisoned, at least he could be stopped by deportation. Therefore, the F.B.I. took its facts to the Immigration Service. It is entirely consistent with the finding of the good faith of the arrest for the F.B.I. to request the I.N.S. to proceed under its immigration authority. The arrest could be brought under a shadow only if the immigration proceeding was a mere subterfuge for taking the petitioner into custody for some other ulterior reason. The evidence before the district court on the motion to suppress and the specific findings of that court (R. 243–244), as sustained by the court below, 258 F. 2d 485, 495, n. 10, completely refute that suggestion.[16]

[16] If, as the government contends, the Fourth Amendment does not apply to deportation cases, then it does not apply to searches and seizures incident to deportation arrests, as well as to the arrests. In other words, if the Fourth Amendment does not apply to deportation cases, the search and seizure made in the instant case were constitutionally valid unless they were so intrinsically unfair as to violate due process. But the search and seizure here were fair in every way. As shown above (*supra*, pp. 5–8, 26–29), the arrest was on the basis of abundant evidence that the petitioner had committed an offense subjecting him to deportation. And as our original brief demonstrated, the search and seizure were of a limited scope, permissible in [fn. cont'd]

4. *The petitioner's arrest was not in violation of due process*

Apart from the Fourth Amendment, deportation proceedings must, of course, conform to the fundamental requirements of due process of law under the Fifth Amendment. *E.g., The Japanese Immigrant Case, supra,* 189 U.S. at 101; *Wong Yang Sung* v. *McGrath, supra,* 339 U.S. at 49; *Carlson* v. *Landon, supra,* 342 U.S. at 542; *Galvan* v. *Press, supra,* 347 U.S. at 530–531. We submit, however, that the procedures utilized by the Immigration and Naturalization Service to arrest and detain aliens, pending a determination of deportability, comply fully with due process.

As is noted above (*supra,* pp. 23–25), all deportation proceedings are now initiated by the issuance of an order to show cause by a district director, deputy district director, or district officer in charge of investigations. 22 Fed. Reg. 9796, 8 C.F.R. 242.1(a). The Operations Instructions of the Service (Appendix, *infra,* pp. 52–53) provide that such orders shall issue only when a prima facie case for deportability has been established. Under the regulations promulgated by the Commissioner of the Service, a district director may issue a warrant of arrest when it appears that it is necessary or desirable. 22 Fed. Reg. 9796, 8

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criminal cases even under the Fourth Amendment (pp. 33–60).

Even if the Court decides that the Fourth Amendment applies to these civil proceedings, we suggest that the reasonableness of a search or seizure should depend, at least in part, on the nature of the proceeding in which it occurs. That is, a search and seizure may well be reasonable in a deportation proceeding even though it would not be considered reasonable under the stricter standards applicable to criminal proceedings.

C.F.R. 242.2(a), *supra*, pp. 24–25. Such decision to issue a warrant for the arrest and detention of an alien is made only in cases where there is a substantial basis for believing that the alien will abscond or that his detention is necessary to promote the national security. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959), §§ 5.3a, 5.4a.

Since a warrant of arrest is issued contemporaneously with or subsequent to the issuance of an order to show cause, no arrests are authorized unless a prima facie case of deportability has been established. This standard is at least as demanding as the probable cause required for issuing a warrant of arrest on a criminal charge. Prima facie evidence of a fact was defined by Mr. Justice Story as such evidence as "in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Pet. 622, 632. See also *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 268; *United States* v. *Wiggins*, 14 Pet. 334, 337; *Parker* v. *Overman*, 18 How. 137, 141–142; *United States* v. *Green*, 136 Fed. 618, 631 (N.D.N.Y.). In comparison, in *Dumbra* v. *United States*, 268 U.S. 435, 441, this Court defined probable cause:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. * * * [I]f the apparent facts set out in the affidavit are such that a reasonably discrete and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

See also *Carroll* v. *United States*, 267 U.S. 132, quoted in *Draper* v. *United States*, 358 U.S. 307, 313, and *Brinegar* v. *United States*, 338 U.S. 160, 175–176. Thus, the requirement of a prima facie case is a fair and reasonable basis upon which to initiate deportation proceedings, and to arrest and detain aliens when these latter measures are necessary or desirable in order to effectively carry out the deportation process. Governmental action based upon the proper application of such a standard is consistent with the fair play and ordered liberty which the due process clause of the Constitution guarantees.

Unlike the procedure in criminal cases, an immigration warrant is not required to be based on information supplied under oath or affirmation. However, that such formality is not essential to due process is clearly shown by the fact that criminal arrests made without warrants on the basis of probable cause, which indeed may be hearsay evidence solely, are upheld. See *Draper* v. *United States*, 358 U.S. 307. Certainly, there is no reason why due process requirements should require more formality in case of an administrative proceeding such as deportation than in a criminal case. As the Court recognized in *The Japanese Immigrant Case*, 189 U.S. 86, 101, in order to meet due process a hearing need not meet "the forms of judicial procedure" but must be "appropriate to the nature of the case."

Since, as we have shown (*supra*, pp. 7–8, 26–29), Acting District Director Murff had more than enough evidence on which to base his determination of a prima facie case (and therefore of probable cause) of

the petitioner's deportability, the petitioner's arrest did not violate due process.

II

THE PETITIONER'S ARREST WAS LEGAL REGARDLESS OF THE VALIDITY OF THE ARREST WARRANT SINCE THE PETITIONER WAS ACTUALLY COMMITTING A MISDEMEANOR IN THE PRESENCE OF THE ARRESTING OFFICER

A. THIS BASIS FOR SUSTAINING THE LEGALITY OF THE ARREST IS PROPERLY BEFORE THE COURT

The government has argued above that the validity of the petitioner's arrest, not having been challenged before the trial court, may not properly be considered for the first time by this Court (*supra*, pp. 14–23). If, however, the Court decides to consider the validity of the petitioner's arrest, it is obvious that the government too must be allowed to make contentions (*infra*, pp. 46–50) for the first time in order to sustain that arrest. Unlike *Giordenello* v. *United States*, 357 U.S. 480, the government has never previously had any reason to justify the arrest at an earlier stage of the proceeding since the petitioner never questioned the validity of his arrest. In fact, the only issue the petitioner raises in his supplemental brief, covering the validity of his arrest, is his contention that the arrest was not made in good faith. Thus, even now the petitioner does not raise the issue which the present arguments of the government are intended to answer—that I.N.S. warrants, whether made in good or bad faith, do not satisfy the warrant standards of the Fourth Amendment and therefore all arrests on the basis of such warrants are invalid.

In addition, even if the Court agrees that the validity of the arrest is not properly before it, nevertheless the arguments which the government makes here to sustain the validity of the arrest should be considered by the Court insofar as they bear on the validity of the search incident to the arrest (see *supra*, pp. 14–16, n. 3, pp. 41–42, n. 16). It is well established that the respondent may urge any argument in support of the judgment below (see, *e.g.*, *Langnes* v. *Green*, 282 U.S. 531, 535–539) unless consideration of the argument would raise factual issues at a time when the petitioner would be unfairly deprived of an opportunity to respond (*Giordenello* v. *United States*, *supra*, 357 U.S. at 487–488). However, the government's new contentions—that the Fourth Amendment does not apply to deportation proceedings (*supra*, pp. 29–36); that, in any event, the arrest was valid under the Fourth Amendment because the arresting officers had probable cause (*supra*, pp. 37–41); and that the arrest was valid because the petitioner was committing a misdemeanor in the officer's presence (*infra*, pp. 46–50)—do not involve any factual issues which are not clearly resolved by the evidence in the present record. Therefore, the petitioner would not be unfairly prejudiced by the Court's consideration of all the government's arguments which support the search and seizure, as well as the arrest.

B. THE PETITIONER'S CONTINUING OFFENSE UNDER THE IMMIGRATION AND NATIONALITY ACT JUSTIFIED HIS ARREST

Even if the Fourth Amendment applies to deportation proceedings and even if it renders the warrant of arrest invalid, the petitioner was nevertheless prop-

erly arrested. He failed to notify the Attorney General of his address, which constitutes a misdemeanor under Section 266 of the Immigration and Nationality Act (8 U.S.C. 1306(b)), as well as a deportable offense. This obligation to notify the Attorney General is a continuing one and therefore an alien who fails to register is guilty of a continuing offense. See *United States* v. *Franklin,* 188 F. 2d 182, 187 (C.A. 7); cf. *United States* v. *Cores,* 356 U.S. 405; *United States* v. *Guertler,* 147 F. 2d 796 (C.A. 2), certiorari denied, 325 U.S. 879; *McGregor* v. *United States,* 206 F. 2d 583 (C.A. 4); *Fogel* v. *United States,* 162 F. 2d 54 (C.A. 5), certiorari denied, 332 U.S. 791. Thus, the petitioner was committing a misdemeanor at the very moment that he was arrested.

Although Sections 242(a) and 287(a) of the Act (8 U.S.C. 1252(a); 1357(a)) give I.N.S. officers authority to make arrests for deportation offenses and for felonies, the Act makes no provision for misdemeanors. Under these circumstances, where no federal statute either authorizes or prohibits arrests for federal offenses, the validity of the arrest is determined by the law of the state in which the arrest is made. *United States* v. *Di Re,* 332 U.S. 581, 589–591; *Pon* v. *United States,* 168 F. 2d 373, 374 (C.A. 1); *United States* v. *Coplon,* 185 F. 2d 629, 633–634 (C.A. 2), certiorari denied, 342 U.S. 920; *Coplon* v. *United States,* 191 F. 2d 749, 753 (C.A. D.C.), certiorari denied, 342 U.S. 926; see *Johnson* v. *United States,* 333 U.S. 10, 15, n. 5. In determining his authority to make the arrest, the officer is regarded as a private person. *United States* v. *Coplon, supra,* 185

F. 2d at 634; *Coplon* v. *United States*, *supra*, 191 F. 2d at 753. The law of New York (where the petitioner was arrested) provides that "A private person may arrest * * * [f]or a crime, committed or attempted in his presence * * *." N.Y. Code Crim. Pro. § 183.

In the instant case, the petitioner was committing a crime in the presence of the arresting officers. The F.B.I. agents, before interviewing the petitioner, knew that he occupied room 839 (R. 97, 137, 175) and that he was committing the offense of having failed to notify the Attorney General of his address (see *supra*, pp. 5–8, 26–29). Standing in the hall outside room 839 of the Hotel Latham, the agents knocked on his door (R. 175). The petitioner answered "Just a minute" or "Just a moment", and opened the door (R. 175). When the petitioner opened the door, the F.B.I. agents were legally in the presence of a person who was committing a crime in their presence and they could have made an arrest. Subsequently, the I.N.S. officers were informed by the F.B.I. that they could enter the room to effect the petitioner's arrest. When the I.N.S. agents stood at the door of the room, they likewise were lawfully in the presence of a person who was then committing a crime.

It is, of course, true that the I.N.S. deliberately decided to institute deportation proceedings against the petitioner (R. 217–218, 220, 223–224) rather than to press criminal charges, and that therefore the order to show cause charged the petitioner only with a de-

portable offense (R. 34–36). But this Court has made it clear that an arrest may be upheld on a theory which was not in the minds of arresting officers. Thus, the Court has held that, even if the warrant upon which an arrest is based is invalid, nevertheless the arrest is valid if the arresting officers had probable cause to believe that the suspect committed the offense charged in the warrant. See cases cited *supra*, pp. 38–39. Moreover, in *United States* v. *Rabinowitz*, 339 U.S. 56, the Court indicated that, regardless of whether the arrest warrant was sufficient, an arrest is valid if the arresting officers have probable cause to believe that the suspect has committed an offense in their presence, even though that offense is not the same as that charged in the warrant. After the Court first stated that the warrant was, "as far as can be ascertained, broad enough to cover the crime of possession" of forged and altered postage stamps, it went on to say that, even if the warrant did not include that offense, "the arrest therefor was valid because the officers had probable cause to believe that [this] felony[17] was being committed in their very presence." *Id.* at 60. While in *Rabinowitz* the offense of possession of forged and altered stamps was closely related to the offense which was clearly included within the scope of the warrant (sale of forged and altered stamps), here the two

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[17] In *Rabinowitz*, felonies were involved, but there seems no reason to distinguish a case involving a misdemeanor committed in the officers' presence where the arresting officers have authority to arrest for such misdemeanors under the applicable law.

offenses are virtually identical although the penalties are of course different.[18]

Under the principle stated in *Rabinowitz*, the petitioner's arrest is valid since the arresting officers had authority under New York law to arrest for the commission of a crime in their presence even though they in fact intended to arrest the petitioner for the deportation offense. Otherwise, the government would be unfairly paralyzed when arresting officers, having several grounds on which to arrest a suspect, happen to choose an invalid rather than a valid ground. The unfairness would be particularly severe in the instant case since the arresting officers could hardly foresee that the arrest procedures which have been used ever since the enactment of immigration legislation would be successfully challenged.

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[18] Both the misdemeanor (8 U.S.C. 1306(b)) and deportation offense (8 U.S.C. 1251(a)(5)) are defined as failure to comply with 8 U.S.C. 1305, which requires the alien to notify the Attorney General of his address. The only difference in the definitions is that Section 1251(a)(5) absolves the alien if "he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful" while Section 1306(b), at least by its terms, does not.

CONCLUSION

For the foregoing reasons, and those set forth in our brief at the 1958 term, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
WILLIAM F. TOMPKINS,
Special Assistant to the Attorney General.
KEVIN T. MARONEY,
BRUCE J. TERRIS,
ANTHONY A. AMBROSIO,
ELIZABETH F. DEFEIS,
Attorneys.

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APPENDIX

IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS

PART 242 *Proceedings to determine deportability of aliens in the United States: apprehension, custody, hearing, and appeal.* (2–6–56; CO 242–P)

SECTION 242 (a)—APPREHENSION AND DETENTION OF DEPORTABLE ALIENS

1. *Commencement.* (a) *General.* Every deportation proceeding shall be commenced with the issuance and service of an order to show cause; the preparation of the entire order to show cause is an investigative responsibility. Application for the order to issue on Form I–265 shall be made by an investigator when a prima facie case for deportability has been established. As a general rule, an application for an order to show cause shall not be made unless the evidence supporting the charges are at hand.

If expatriation is involved in a case, the application for an order to show cause shall be supported by a recorded, verbatim question-and-answer statement, which shall be taken through an interpreter if there is any possibility that the subject may use as a defense, his inability to speak or understand English.

It shall be discretionary with the district director whether to institute deportation proceedings or to withhold action in favor of the naturalization process in the case of a petitioner for naturalization who is prima facie both deportable and eligible for naturalization. A district director in his discretion, and subject to approval by the regional commissioner, may

cancel an order to show cause and terminate proceedings thereunder when the alien is prima facie eligible for naturalization. Such discretion shall not be exercised unless the case involves appealing humanitarian factors (see paragraph 1, OI–9—Assistant Commissioner, Investigations Division). (*Added* 5–31–57)

When a district director is in doubt as to the course of action in a particular case he may submit a request for an advisory opinion to the regional office. If, in the opinion of the regional office, a case presents a sufficiently complex or difficult question, that office may submit a request for an advisory opinion to the Assistant Commissioner, Investigations Division, Central Office. (6–15–57)

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